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No. 88-314

In the Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD D. JACKSON,
Petitioner,

vs.

ST. JOSEPH STATE HOSPITAL, et al.,
Respondents.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO WRIT

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QUESTION PRESENTED FOR REVIEW

Whether an employee with a history of disruptive behavior in the work place whose conduct while attempting to secure a statement for EEOC from a subordinate employee disrupts the work environment for a fellow employee and seeks to pressure the co-worker into modifying or changing a previous statement against her will are acts that deprive an employee protection under the participation clause of Title VII.

LIST OF ALL PARTIES

1. Richard Jackson, Petitioner
2. St. Joseph State Hospital, Respondent
3. Dr. Nicholas Bartulica, M.D., Respondent
4. David Farrar, Respondent
5. Henry J. Colman, Respondent

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COUNTER STATEMENT OF CASE

The panel decision clearly sets out the historical series of incidents that resulted in the "last straw" which caused Mr. Jackson's dismissal. Jackson was hired in 1975 and by 1977 complaints by Jackson's subordinate employees were being heard by the Director of the Department of Mental Health and State legislators in Jefferson City. The employer received complaints that Jackson would discuss one employee's private life with other employees and that Jackson's managerial style was causing low morale. These complaints were substantiated by Chief Auditor of DMH during a field audit specifically requested by the Director of the Department to investigate the complaints against Jackson.

The Superintendent of St. Joseph State Hospital convened two separate meetings for employees to voice their concerns and requested Jackson to be present. Jackson declined to attend on both occasions. Jackson was informed in 1978 that disciplinary action would be taken if corrective action was not forthcoming.

In October 1978, Jackson's secretary filed a grievance against Jackson alleging that Jackson discussed employees' personal lives with her and that Jackson frequently called her into his office on Friday to demean and criticize her. Jackson's supervisor called a meeting between Jackson and his secretary. Jackson hit his fist on a piece of furniture during the meeting and stated he would run the secretary out of the Department. Jackson was informed that if he did not change his ways he would be removed as a Department head.

In January of 1982, another employee (Kuhn) under Jackson filed a complaint against Jackson. Jackson told this white female employee (Kuhn) that he did not approve of her black boyfriend and that no promotion would be forthcoming while the relationship continued. Jackson also told this employee that her children living with her ex-husband was unacceptable. The employee also complained that Jackson frequently touched or grabbed her. On the same day this employee filed a grievance Jackson requested this employee be suspended for one day with pay for failure to complete work reports. Superintendent Bartulica talked to Jackson and the employee and successfully obtained their consent to withdraw the grievance and disciplinary request.

On June 4, 1982, Jackson went to Mahoney's office to find employee Kuhn. Jackson approached Kuhn from

behind put his left hand on her right shoulder walked around in front of Kuhn and did not remove his hand until Kuhn moved away and stood up. Kuhn made an attempt to move to get away from Jackson while she was seated. On June 10, 1982 Jackson called Kuhn into his office to say she was "glowing" and wanted to discuss her drinking with her. Kuhn left his office. Kuhn filed a grievance alleging harassment regarding the incidents of June 4 and 9.

On June 14, 1982 the Superintendent, Jackson's Supervisor, and the Personnel Officer talked with Jackson about the severe lack of judgment and tact in addressing Kuhn on June 4 and June 9. Jackson gave three different versions of the incident of June 4 and denied all the allegations. Dr. Bartulica reprimanded Jackson and requested his resignation which Jackson refused to tender.

The written reprimand outlined his previous deficiencies and put Jackson on notice that he should not place his hands on female employees, cease inquiries into private lives of his employees, cease gossiping about private lives of employees, and conduct all counseling with female employees in the presence of a witness. The requirement of a witness to counseling of female employees was to protect the facility and Jackson from future complaints of sexual harassment.

On July 30, 1982 Jackson filed an internal complaint alleging sexual harassment. The Division's Director found no probable cause and dismissed the complaint on October 1, 1982.

On November 8, 1982 Jackson issued a written counseling to Kuhn accusing her of lying and ordering her

to stop fidgeting, prolonged scratching, and walking off leaving him talking to himself. Jackson also verbally counseled Kuhn on this date with no witness present in the room.

On November 18, 1982 Jackson was apprised by his supervisor that he would be recommending a suspension for Jackson. After being advised of the recommendation, Jackson stated he filed an EEOC complaint the previous day. On November 24, Superintendent Bartulica presented the suspension letter to Jackson. Jackson was suspended without pay from December 1 through December 3, 1982.

Jackson filed a second EEOC complaint on December 13, 1982, alleging that his suspension was retaliatory.

On January 24, Ms. Mahoney testified to the facts as follows:

> Q. I would like to bring your attention to the latter part of January, specifically January 24, 1983, and did you have a meeting with Mr. Jackson that day?
>
> A. Yes, I did.
>
> Q. Will you tell us what happened?
>
> A. I was called into his office, and something to the effect that he had been advised that he was allowed to call witnesses to an EEOC hearing that was going to be scheduled, I believe it was sometime later that month.
>
> Q. Do you recall what time this was when the discussion started?
>
> A. It was about 8:15 in the morning.

Q. Okay.

A. Rather than having me attend, he didn't think that was necessary, that a statement from me could be taken by him to this session. I informed him I had already made a statement. This was in regard to the events that occurred in my office with Mrs. Kuhn in June. I informed him I had already given a statement and it was my understanding that EEOC had that statement and that if there was any clarification needed or any other information that was needed by them, that I felt a member of EEOC would be contacting me, or if he had an attorney, that his attorney should be contacting me. I didn't think it was proper for me to discuss it with him. I had already given a statement that was sufficient. *And he wanted to know whether or not I could have misunderstood the action that I had perceived Mrs. Kuhn making as pulling away from his hand, could it have been possible that she was reaching to retrieve some folders that she had on her lap?* I repeated that I had given a statement as to what I had seen, my honest recollection of what had taken place, and, no, I didn't know if that was true.

That is not what I had seen. It was repeating the same questions several times, my answering that I didn't wish to make another statement unless it was requested by a member of EEOC or by his attorney, someone other than himself, in other words. Finally, he accepted that.

Q. How long did this discussion last?

A. Approximately 45 minutes.

Q. Were there other topics discussed during that 45 minute period?

A. That was the topic of conversation, totally.

Q. Did he ask you several times?

A. Yes.

Q. What happened next?

A. I went back to my office and it wasn't very much longer, he came into my office and again asked if I would make a statement, *that my memory might not have been clear,* that she could have been retrieving some folders, and that was the motion I had seen, and I again repeated the same thing, that that is not what I saw.

Q. What was your reaction to all of this?

A. I was angry. I was upset, because I had said in no uncertain terms and phrased it very clearly that I didn't wish to make a statement. He wasn't accepting my refusal.

Q. What was his response?

A. I finally left the office that day.

Q. What happened next?

A. On Wednesday, the 26th of January, he came into my office and he had a yellow legal tablet and on this, it may have just been one page, but that type of paper, and there was a statement written as though I had written it, as though it were coming from me.

Q. Do you remember how many pages it was?

A. I believe it was just the one page. I can't remember clearly whether it was more than that. It wasn't more that two, I am sure. *It was more or less saying what he had asked me to make a statement in regard to that my memory was a little unclear to the events that had actually taken place that day, and in thinking about the matter, that she possibly was reaching to retrieve these folders and I wanted to clarify that, something to that effect.* I told him that I was not going to sign the statement. He was asking me to read it over. I could change the wording if I wished, but he would like me to read it over and he would have it typed up for my signature with any revisions that I would like to make.

I told him I was not going to sign it, I was not giving him a statement, and if I had told him prior that any more information was needed, if I was asked to testify by the EEOC I would be there. If I were asked to give any more information as to a statement from them, I would gladly give it, but I didn't think it was proper for him to be asking me for information. It should come from another source.

Q. Did you tell him, "I have already told you that"?

A. Yes.

Q. What was his reaction to that?

A. As though the conversation on Monday had not taken place, any of the conversation had not taken place.

Q. What was your reaction?

A. I was extremely upset.

Q. Will you describe that?

A. I was a little fearful because I had said no several times, and it didn't seem to be accepted. This was unbelievable that after the conversation that we had on Monday, when I expressed by position to him so clearly, that he would have written this and again asked me for a statement. I didn't want to work under those conditions any longer.

Q. What did you do?

A. I contacted Mr. Farrar and I went down and talked to him. I told him what had taken place on Monday and again that morning.

Q. What kind of emotional state were you in?

A. Well, I wasn't capable of performing any of my duties, that is for sure. I was just terribly upset. I didn't wish to continue to work with the possibility that that type of situation would come up again, that I would constantly be asked the same question over and over again, when I made my position very clear.

On January 26, 1983 Jackson was put on leave with pay pending an investigation of the incidents of January 24 and 26. On February 17, Jackson received a dismissal letter reciting the historical progression of disciplinary actions. Moreover Jackson was put on notice that the proposed action of dismissal was based on his attempt to get the employee to change a previous statement and exhibiting behavior that was disruptive to work activities of the employee and others. Jackson was given until February 25, 1983 to show cause why the dismissal should not be effected. Jackson's written response was rejected, he appealed his dismissal to the Personnel Advisory Board which affirmed the dismissal.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Eighth Circuit Court of Appeals correctly determined that plaintiff-petitioner failed to present a *prima facie* case of retaliatory discharge under Title VII in that petitioner's conduct in pursuing a statement for EEOC was highly offensive and disruptive particularly after petitioner had received several warnings to change the way he dealt with subordinates. Moreover, the Eighth Circuit opinion does not espouse a "subjective standard" for determining whether conduct is protected under Title VII nor is the decision at odds with previous Circuit Court opinions holding that conduct to be protected under Title VII must be reasonable, applying a balancing test to the factual determination of whether the conduct is protected.

A.

Petitioner seeks a writ of certiorari from this Court based upon the argument that the Eighth Circuit decision in this matter applies a "subjective standard" in its determination that the petitioner's conduct exceeded the scope of protection offered by Title VII. Petitioner claims the Eighth Circuit removed petitioner's protection not so much by his actions as by the employer's and his co-employees' reactions to, or perceptions of, his actions.

In *Hochstadt v. Worcester Foundation For Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976), the First Circuit held that courts must balance the purpose of Title VII to protect persons engaging reasonably in activities opposing (or participating in the processing of a complaint) in discrimination, against Congress' equally manifest desire not to tie the hands of employers in the

objective selection and control of personnel [See also *Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 374 (7th Cir. 1984); *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1015 (9th Cir. 1983); and *Francoeur v. Corroon & Black Co.*, 552 F. Supp. 403, 412 (S.D. N.Y. 1982)]. It is clear that not all opposition or participation activity is protected under Title VII. The manner of the employee's conduct must be reasonable as determined by a case-by-case basis keeping in mind the purposes of Title VII discussed above. *Hochstadt v. Worcester Foundation, Inc.*, 545 F.2d 222, *supra* at 231.

The First Circuit continued in its reasoning in *Hochstadt, supra* at 231, that allowing an employee to invoke the protection of Title VII for conduct aimed at achieving purely ulterior objectives, or for conduct aimed at achieving even proper objectives through the use of improper means, could have an effect directly contrary to Congress' goal, by discouraging employers from hiring persons whom the Act is designed to protect. Further, the First Circuit set out a balancing standard the courts and the employer must use in each case to determine whether the conduct of an employee who is opposing discrimination or participating in processing a complaint of discrimination is protected under Title VII. The First Circuit sets out the following:

> The standard can be little more definitive than the rule of reason applied by a judge or other tribunal to given facts. The requirements of the job and the tolerable limits of conduct in a particular setting must be explored.

Circuit Courts have recognized and do apply a balancing test to determine if opposition or participation

conduct is protected under Title VII. In *Rosser v. Laborers' International Union of North America,* 616 F.2d 221, 223-24 (5th Cir. 1980), *cert. denied,* 449 U.S. 886, 101 S. Ct. 241, 66 L. Ed.2d 112 (1980), an employee's hostility to a supervisor rendered her ineffective in the performance of her duties and therefore her conduct was not protected. Also, the Fifth Circuit in *Jefferies v. Harris Co. Comm. Action Association,* 615 F.2d 1025, 1036 (5th Cir. 1980), an employee's surreptitious copying of confidential documents interfered with the employer's interest in maintaining confidentiality of employment records. In *Ammons v. Zia Company,* 448 F.2d 117 (10th Cir. 1971) the Tenth Circuit found an employee with a history of poor work performance constantly complained about her pay and that the employer discharged the employee for a series of incidents not relating to discrimination. Moreover, the Ninth Circuit in *Silver v. KCA, Inc.,* 586 F.2d 138, 141 (9th Cir. 1978), recognizes that not all acts by an employee in participation of an employment discrimination complaint or opposition to discrimination is protected under Title VII. The means of opposition or participation must be reasonable in light of the employer's interest in maintaining a harmonious and efficient operation. *Id.* Furthermore, the Ninth Circuit in *Ruggles v. California Polytechnic State University,* 797 F.2d 782, 786-87 (9th Cir. 1986), holds that engaging in protected activity or conduct should not put the employee in a better position than she would be otherwise.

Thus the Circuit Courts have adopted a balancing standard based upon a rule of reason comparable to a fact finding by a judge to determine on a case-by-case basis whether participation or opposition conduct is protected under Title VII. This balancing standard was

used by the Eighth Circuit in the case at bar. The Eighth Circuit is not clearly erroneous in its finding that the conduct of petitioner herein was not protected in that the Act does not clothe the complainant with immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct in dealing with subordinates and with peers (App. A to Petitioner's Petition at A9). The Circuit Court judged petitioner's conduct in light of employer's and employee's interests and found that petitioner's conduct was not protected. The Eighth Circuit made a finding of fact based upon objective standards and there is no indication any subjective measure was applied.

B.

The Circuit Court's decision herein is consistent with the cases cited by petitioner in his petition for Writ of Certiorari. Petitioner claims the level of protection granted in the cases cited in his petition are in conflict with the Eighth Circuit opinion herein in that the Eighth Circuit denied protected status to petitioner's conduct based upon the employer's and co-worker's reaction or perceptions of petitioner's conduct.

In support of this claim of error, petitioner states the trial court herein acknowledged that the employer may have "overreacted" when petitioner was discharged, but still upheld the decision on a finding that even if that were the case it would be a "personnel decision", not retaliation. Petitioner complains that protected activity should not be reduced to a personnel decision by the employer. However, the district court was clearly stating that there was no evidence to indicate that the co-worker or the employer would have taken adverse

action if plaintiff had limited his contacts to reasonable grounds (App. A, A20). Hence no evidence was found to hold that the processing of the EEOC statement, *per se,* played any part in the dismissal. The manner in which petitioner conducted himself coupled with his long history of disruptive behavior resulted in his termination. Title VII prohibits retaliation for protected activity but is not a shield against harsh treatment at the work place not found to be retaliatory. *McCollum v. Bolger,* 794 F.2d 602, 610 (11th Cir. 1986).

Again, petitioner claims the cases he cites are in conflict with the Eighth Circuit opinion herein. Respondents maintain that the courts in the cases cited applied a balancing test in each case and struck the balance in favor of the employee or the employer after application of the interests involved. For example, in *Pettway v. American Cast Iron Pipe Company,* 411 F.2d 998 (5th Cir. 1969) the Circuit Court found that the EEOC complaint contained malicious material against the employer, but that the strict rules of confidentiality of the complaint and penalty for disclosure protected the employer from any injury or damage and therefore the interests of the employer were protected and the court found for the employee. In *Sias v. City Demonstration Agency,* 588 F.2d 692 (9th Cir. 1978) an employee wrote a letter to HUD complaining about deficiency in number of Mexican-Americans employed at his work, the court found the employee was discharged because he wrote the letter and there was no evidence that his activity was disruptive to the work environment. The court concluded the employee's activities were reasonable.

Petitioner also cites *Womack v. Munson,* 619 F.2d 1292 (8th Cir. 1980) and argues that the case at bar is

in conflict with the level of protection granted in *Womack*. The Eighth Circuit found that there was no independent basis for the dismissal other than the content of the complaint. Because the reason for the dismissal was inextricably related to the allegation in the complaint, the discharge was retaliatory. The issue in *Womack* was whether there was a reason for the dismissal separate from the complaint; the court answered "no." Unlike the case at bar, petitioner was discharged for his disruptive conduct, i.e., attempting to have a co-worker modify an earlier statement against her will and causing disruption in the work place.

In *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346 (9th Cir. 1984), the court found that a black nurse's complaints about patient care did not disrupt the work environment and were reasonable. However, the court did state that there may be situations where the employee's activity coupled with conduct of a disruptive nature can exceed statutory protection. *Wrighten, supra* at 1355-1356. Thus, the above-referenced cases are not inconsistent with the Eighth Circuit case at bar in that all cases employed a balancing test to ascertain if the conduct of the employee was protected conduct.

CONCLUSION

This Court should deny the request for Writ of Certiorari in that the Eighth Circuit case challenged in this matter applies the well-established balancing test to determine whether the conduct of the employee has exceeded reasonable grounds and thereby fails to be protected activity. Moreover the Eighth Circuit decision adequately protects the interests of the employee and employer in retaliation claims. Therefore, this Court should deny the request for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 28.2, I, MARY STEWART TANSEY, a member of the bar of this Court, do hereby certify, under oath, that copies of the Brief in Opposition filed by Respondents in the matter of *Richard D. Jackson v. St. Joseph State Hospital, et al.*, No. 88-314 were deposited in the United States Post Office, first-class postage affixed, on September 23, 1988, and addressed to:

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